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No. 874

October Term, 1958

IN THE

# Supreme Court of the United States

BENNIE L. WHITFIELD, ET AL., *Petitioners*
v.
UNITED STEELWORKERS OF AMERICA, LOCAL 2708, ET AL.,
*Respondents*

## BRIEF OF RESPONDENTS, Local 2708 and Claude Baldree, Its President, In Opposition To Petition For Writ of Certiorari To the United States Court of Appeals Fifth Circuit

DIXIE & SCHULMAN
CHRIS DIXIE
505 Scanlan Building
Houston 2, Texas
*Attorneys for Respondents*

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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This reply in opposition to the grant of certiorari is filed on behalf of Local 2708, United Steelworkers of America, AFL-CIO, an unincorporated association, and Claude Baldree, president of the local union, two of the Respondents and Defendants below.

The other Respondent, Armco Steel Corporation, the employer, will file its own reply.

These Respondents accept Petitioners' Preliminary Statement, Statement of Jurisdictional Requisites, and Statement of Statutes involved.

## QUESTIONS PRESENTED

We regret we cannot accept Petitioners' statements of the three questions. We think each of them tends to assume the matter in dispute and thus answers itself without disclosing the exact issue in the case.

The three questions stated in the petition are somewhat vague and general. Further, the discussion in the statement and in the supporting brief goes far beyond the matters which were actually litigated in the District Court and submitted to the Court of Appeals.

As reflected by Plaintiffs' Complaint (Tr. 4-16), by the District Court's Findings of Fact and Conclusions of Law (Tr. 665-693 at page 672) and by the opinion of the Court of Appeals (Petition, page 17), two specific complaints were presented by Petitioners to the courts below. The first of these concerned the matter of examinations. The opinion of the Court of Appeals makes full and fair answer to this complaint. Apparently, this question is now abandoned by Petitioners for it is not mentioned in the Petition for Certiorari.

The second specific complaint raised below is the allegation that Negro employees must suffer a "penalty" as the price of promotion, thereby being subjected to an unlawful or discriminatory discouragement. This matter is mentioned in the second stated question presented by Petitioners.

Therefore, the only question truly preserved and now raised for consideration of the Supreme Court is as follows:

> In some cases Negro applicants may receive reduced pay upon entering a Number 1 line of progression. Does this fact render the contract discriminatory or unlawful under the circumstances of this case?

We believe the foregoing is the precise matter which is now properly brought forward. However, these Respondents say that the entire transaction which is the background of this specific complaint was a very proper and responsible revision of employment practices by an employer and a union to meet allegations of racial discrimination and to make corrections by fully complying with the letter and spirit of the law. Therefore, in replying here, we think it proper to touch upon all of the criticisms interspersed throughout the petition.

## STATEMENT OF THE CASE

The opinion of the Court of Appeals is in the main an accurate summary of the things done by the company and the union in the May 31, 1956 agreement. In short, from the beginning in 1942 until shortly before the agreement, all Number 1 lines were occupied by white employees and all Number 2 lines by Negroes. The Number 1 lines were manned in each department by means of hiring new employees into the bottom jobs. All hiring has always been done by the company unilaterally.

Since 1949 Negro employees have been hired by the company into a Labor Pool; thence, they have promoted upward into the various Number 2 lines of progression.

The May 31, 1956 agreement abolished all distinctions in starting jobs and provided that white and Negro employees alike would be employed into the same job in the Labor Pool. From there all employees promote by seniority into the Number 2 lines of progression. Furthermore, they promote by seniority into the Number 1 lines of progression if they exhibit the identical qualifications required by the company to man its skilled jobs.

Thus, the former right of the company to unilaterally select new employees to enter into its Number 1 lines of progression has been contracted away. The bottom job in each Number 1 line of progression is now a "bid job" subject first to the preferential bid of an employee in the Number 2 line of progression in the same department. If the job is not bid in by an employee in the Number 2 line of progression, then it is subjected to the preferential bid of an employee in the Labor Pool. Since all employees in the Number 2 lines and in the Labor Pool were Negroes as of the date of the agreement, all starting jobs in all Number 1 lines of progression have been made preferentially available to the Negro incumbents in the plant. Evidently, this is the fact that caused the Court of Appeals to comment: "If there is racial discrimination under the new contract, it is discrimination in favor of Negroes." (Petition, page 17)

The case came on for trial in September, 1957, more than a year after the effective date of the agreement. The trial court's judgment for defendant was not entered until December 10, 1957 (Tr. 692-693). As of the date of trial, forty-five Negro employees had moved into the skilled jobs, and an additional forty-five had qualified themselves and thus constituted a reservoir of qualified employees to move into the Number 1 lines (Tr. 687).

Not one iota of evidence was offered to show that the possible step-down ("penalty") in pay had in fact occurred in any case, or was excessive, or had in fact operated in a discriminatory manner.

The opinion of the Court of Appeals contains a sufficient answer to this complaint in two paragraphs (Petition, pages 18-19). The requirement that an employee enter a Number 1 line at the bottom job was found by both courts below upon adequate evidence to be a requirement arising out of business necessity, not out of racial discrimination. The Number 1 lines are nothing more than the systematic arrangement of a group of logically interrelated skilled jobs within a department. Upward progression from the simplest job at the bottom to the most demanding at the top is a necessity to provide systematic employee training and development.

Furthermore, as the court below noted, the possibility that an employee in a Number 2 line must suffer some reduction in pay results from the pay schedule attached to particular jobs and is the same for both whites and Negroes. Furthermore, if the suspicious mind would imagine that the purpose of the contract was to dissuade the highest ranking occupant of a Number 2 line from taking a cut, the Court properly noted that the bid would then revert to another Negro lower in the Number 2 line, and then to still another Negro in the Labor Pool, either of whom might well receive an *increase* in taking the step into the Number 1 line.

Not set out in the Court of Appeals' opinion is the background reason for this possible step-down in some cases.

This record shows that the wage rates of various jobs are expressed in the steel industry in terms of "points". Thus, there is a four-point job, or a five-point job, or a twelve-point job (Tr. 542). The difference between each point is 6½¢ per hour (Tr. 542). The wage for a two-point job is $1.89 per hour (Tr. 211).

In past years, the parties here have contracted to adopt the Steelworkers' famed "Inequity Program". In the evaluation of the proper pay for the jobs in this steel mill, twelve factors have been contractually adopted by the company and the union (Tr. 542). These are, (1) pre-employment training, (2) mental effort, (3) mental skill, (4) responsibility for materials, (5) responsibility for operations, (6) responsibility for the safety of others, (7) physical effort, (8) surroundings of the work, (9) hazard of the work, and three others which do not appear in the record (Tr. 542-543).

Accordingly, a given nine-point job might be so rated because it involves excessive risks, or hazard to the man, excessive heat or temperature, or a large amount of physical effort (Tr. 543). Thus, it is possible that a hypothetical nine-point *unskilled* job may be rated this high (for wage purposes) because of its physical demands without being a good index of a man's capacity to develop in skilled lines of progression (Tr. 543). Obviously, the bottom job of a Number 1 line may be rated lower than some jobs in the Number 2 line of progression because the latter may be heavily weighted in the physical and non-skilled factors.

The wage rates so attached to these various factors of human values are not discriminatory. To the contrary, they were highly appropriate bargainable matters about which company and union have contracted in the past. Indeed,

this kind of wage structure reflects a very proper regard by the union for the adequate compensation of the unskilled worker, who in past years has been the Negro employee. Contrary to some sordid episode of non-representation recorded by others in the law books, this union has attached real weight to the physical demands upon the unskilled worker, as well as his surrounding conditions of risk and discomfort which are commonplace in the steel industry, thereby causing some unskilled jobs to carry a higher rate of pay than some skilled jobs. These commendable efforts by the union have now come back to plague it in the form of an argument that the occasional step-down in pay is "discriminatory" on grounds of race.

## REASONS FOR DENYING THE WRIT

1. We respectfully suggest to the Supreme Court that the specific complaint of "penalty" upon bidding into a Number 1 job is insubstantial. The contrary findings below are based upon solid evidence and good sense.

2. As to the broader approach, full recognition of the obligation to accord equal and fair representation has been given by both courts below. Every complaint or criticism submitted by Petitioners below was carefully examined. The May 31, 1956 agreement was scrutinized in great detail responsively to the said complaints. The findings of fact below are unchallenged and fully based upon credible evidence. No quarter has been given to any weakening of the obligation of fidelity to all and none was requested.

3. As to the future, the May 31, 1956 agreement is admittedly unchallengable. With all new employment concentrated into one starting job, and all promotions into all departments regulated by one set of rules, the program

is fixed by which Labor Pool, Number 2 lines, and Number 1 lines will, in due course, be indiscriminately manned by both races with every man progressing without reference to race. As between two young high school graduates, white and negro, respectively, who hire out at this plant *after* the May 31, 1956 agreement, there can be no possible difference in their careers traceable to race. Not even a courtesy deference to the old way has been left.

4. As to the incumbents, of course, the solution was not so easy. Here, Petitioners seek to exploit the candid recognition by the Court of Appeals that some holdover disadvantage may remain. "We cannot turn back the clock." (Petition, page 21.) However, the union did cause *every* opening in every starting job of a Number 1 line to be subjected first to the bids of the incumbent Negro employees. This condition continues under the contract until all eligibles (present and future) have been exhausted. Any employee who declines to take the uniform test, or who fails, has the continuing right to re-take the test every six months until he does pass. Upon passing, he becomes a preferred bidder. (Tr. 31)

5. It is true that before the May 31, 1956 agreement, whites were the sole occupants of Number 1 lines, and Negroes were the sole occupants of Number 2 lines. The Court of Appeals assumed from this that: "In the past, Negroes were treated unfairly in not having an opportunity to qualify for skilled jobs." (Petition, page 21) Perhaps the court was granting *arguendo* that the former division of the jobs was unfair.

However, this record shows conclusively that the former condition existed by consent and procurement of the

Negro employees and by Negro representatives of this always thoroughly integrated local union. Negro employees and members have held key union offices and have participated in all phases of the bargaining processes, including the designing of the lines of progression and the channels of promotion. (Tr. 671; 674; 675). A division of the jobs which reserved to the Negro employees a percentage of the jobs which exceeded several times over their population ratio in the community was understandably acceptable to them and desirable in the past. When change was for the first time demanded by them (Tr. 675) it was made, as it should have been (Tr. 676; 137).

The former division of the jobs, however, is a different matter from the establishment and maintenance of the lines of progression. Upon uncontradicted and substantial evidence the District Court found that all aspects of the lines of progression, their arrangement, promotion within them, and the requirement of progression from the bottom to the top are actuated by good faith and prudent business management (Tr. 675; esp. 685-686). The company has always insisted upon this logical arrangement of the related jobs (Tr. 675; 677) and the job-to-job promotion (Tr. 677-678). The District Court further found upon sufficient evidence that the system adopted was based upon relevant factors and that a disturbance of the system would deprive the company of the basic condition to its agreement to any system of promotion by seniority (Tr. 679). Even Petitioners' counsel at the trial below were careful not to attack the lines of progression as such:

> "We have not contended that lines 1 and lines 2 should be eliminated. We believe what we call discriminatory practices should be eliminated." (Tr. 511)

Finding of Fact No. 38 (Tr. 685-686), unchallenged below, is as follows:

> "38. The Lines of Progression have been set up in good faith, in accordance with sound and prudent business management, and are appropriate for the efficient operation of a steel mill. They were not motivated by bad faith or racial discrimination. It is true that prior to the May 31st Agreement only white employees staffed the No. 1 Lines and negro employees staffed the No. 2 Lines. The No. 1 Lines involved the performance of skilled work in the production and maintenance departments of the Company and the No. 2 Lines involved the performance either of unskilled work or work requiring a minimum degree of skill. Since the May 31st Agreement there is no racial distinction or discrimination in the No. 2 and No. 1 Lines but all such Lines are now being staffed indiscriminately with both white and negro employees. The fact that prior to May 31st Agreement No. 2 Lines were staffed by Negroes does not present any basis for eliminating No. 2 Lines since the true basis for the existence of the No. 2 Lines is to provide a proper, prudent and sound sub-departmentalization of the operations of the steel plant regardless of whether the employees in such Line consist wholly of Negroes, wholly of whites or both races indiscriminately."

6. Among the commonplace bargaining issues in America today are the demands of industry for promotion systems which provide orderly, thorough and reliable development of employee skills and experience. Pure seniority promotion unrelated to the skills needed for the job can seldom be bargained for—even if we lightly assume that it is desirable. It was not discriminatory for the May 31, 1956 contract to leave in effect the same path of promotion which

had always been, and would still be, utilized for white employees.

These matters would seem to go without saying. However, Petitioners describe this feature of the contract as an impairment of the Negroes' seniority. Obviously, this is not so. Furthermore, both courts below found complete good faith on the part of this Respondent union. The history of the union supports the findings (Tr. 690; Petition, page 21).

7. There is no conflict with the decision of the Fourth Circuit in *Rolax v. Atlantic Coastline Ry. Co.*, 186 F. 2d 473. In that case, it is revealed that Negro firemen, because they were Negroes, were never promoted to engineers in the railroad industry as a matter of custom and practice. The union in that case caused the railroad to adopt a "forced promotion rule" under the terms of which Negroes were required to promote to engineers. If they failed to qualify as engineers, they lost all employment. Thus, the union had designed a rule which on its surface applied with equal and majestic impartiality to the employees of both races, but which in practice would eliminate the non-promotionable Negro firemen because they could not qualify to become engineers. This transparent ruse was stricken down by the Fourth Circuit as it properly should have been. But the court there pointed out that, of course, it is proper for the railroad to adopt rules regarding the service of firemen as are necessary to provide experience for the training of engineers and to enter into agreements with the union with regard thereto. The holding is simply that the need for proper rules may not be used as a pretext for bringing harm or disadvantage to the Negroes because of race.

In our case, the seniority of the Negro employees is fully protected and at the same time they are given equal opportunity to move upward. No pretext is involved and the record is devoid of any ugly tell-tale signs that something less will be done than the May 31 agreement promises or the Constitution requires.

8. While full fidelity to all races is rightly required by *Steele v. Louisville & N. R. Co.*, 322 U.S. 192, the actual integration of a complex plant like this one involves an interplay of "relevant" problems even after the invidious is expunged. It is the duty—and the right—of the bargainers to make the necessary changes in the first instance. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Company v. Huffman*, 345 U.S. 330. Here the only "discretion" exercised by the bargaining agent was to accept the identical combination of training and seniority which had theretofore been found proper by company and union. It is hard to conceive how the union could do otherwise.

## CONCLUSION

These Respondents realize that the discussion here has gone beyond the precise issue properly raised by the Petition for Certiorari. This has been made necessary by the fact that the petition, itself, does the same.

Since the trial occurred after the May 31, 1956 agreement had been in operation for more than a year, and since no irregularities or bad results in practices were claimed or proved, we think there is every support for the assertion that the judgments below were right.

The misgivings of the Petitioners asserted in the Court of Appeals and here have no merit. If there is a failure to give faithful and non-discriminatory performance under the May 31 agreement, the courthouse continues to be open.

These Respondents respectfully submit that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals should be denied.

Respectfully submitted,

CHRIS DIXIE
503 Scanlan Building
Houston 2, Texas

By _____
*Attorney for Respondents, Local 2708, United Steelworkers of America, AFL-CIO, and Claude Baldree*

## CERTIFICATE

Service on counsel for Petitioners and counsel for remaining Respondent has been duly made in person on May _____, 1959, which service has been properly certified to the Clerk of the Supreme Court.

_____